Kentucky Electric Steel Acquisitions *and* Harry K. Chaffin. Case 9–CA–41511

December 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 14, 2005, Administrative Law Judge Michael A. Rosas issued the attached decision.[1] The Respondent filed a limited exception and supporting argument.

The National Labor Relations Board has considered the decision and record in light of the exception and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kentucky Electric Steel Acquisitions, Coalton, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

[1] On October 3, 2005, the judge issued an "Errata" correcting his recommended Order and notice to include a remedy for the 8(a)(4) violation that he found.

[2] The Respondent has not excepted to the violations found by the judge. It has, however, excepted to the judge's finding at sec. II,D, par. 1, of this decision, that "[t]he Respondent had agreed to 'post' available positions for union members and, if none were qualified, only then would it consider applicants other than former KESI employees." We find merit in this limited exception. The judge's finding appears to be based on testimony concerning the hiring of a small number of electronic repairmen, not the hiring of the Respondent's entire work force. Although the Respondent hired primarily former employees of its predecessor KESI, the record does not establish that the Respondent agreed to post all of its available jobs for union members, as the judge suggested. Accordingly, in affirming the judge's decision, we do not rely on this particular finding, which does not affect the judge's other findings or conclusions.

Linda B. Finch, Esq., for the General Counsel.

Gregory L. Monge, Esq. (Vanantwerp, Monge, Jones & Edwards), of Ashland, Kentucky, for the Respondent.

Garis L. Pruitt, Esq. (Pruitt & Thorner), of Catlettsburg, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Ironton, Ohio, on April 12–13, 2005. On November 3, 2004, Harry K. Chaffin, an individual, filed an unfair labor practice charge against Kentucky Electric Steel Acquisitions (the Respondent). A first amended charge was filed on December 16, 2004, and a second amended charge was filed on December 29, 2004.[1] On January 31, 2005, the Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The complaint alleges that the Respondent unlawfully failed to hire and consider for hire Harry K. Chaffin in retaliation for engaging in protected concerted activities and for filing the instant charges. The Respondent filed an answer on February 9, 2005, denying that it violated the Act. The hearing, initially scheduled for March 9, 2005, was rescheduled on March 1 until April 12, 2005.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a steel mill consisting of a melt shop and rolling mill in Coalton, Kentucky. In the course and conduct of its business operation, the Respondent annually sells and ships flat steel bars valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Collective-Bargaining Agreement

In June 2003, a group consisting of Libra Securities and an unnamed investor (collectively, the Libra group) sought to purchase the Coalton, Kentucky steel mill facility (the Coalton facility) of Kentucky Electric Steel, Inc. (KESI) at a bankruptcy auction. As KESI employees had been represented by the Union for more than 30 years, the bankruptcy court made the sale of the Coalton facility contingent on the successful negotiation of a collective-bargaining agreement (CBA).

[1] All dates are in 2004, unless otherwise indicated.

In that regard, the Libra group hired Pinnacle Steel, LLC (Pinnacle), a management consultant. Pinnacle then hired Donald Keffer, a labor relations consultant, to handle collective bargaining with the Union. The head of the Union's negotiating committee (negotiating committee) was Carlton Hall, a union staff representative. Collective bargaining began in or around June 2003.[2] During negotiations, the Union demanded that the Respondent hire applicants based on their seniority as former KESI employees. The Respondent agreed to hire all five negotiating committee members, but otherwise refused to include such a recall provision for former KESI employees in the CBA. It did, however, enter into a verbal "gentleman's agreement" with the Union, notwithstanding the CBA, that it would hire from the KESI employee workforce based on "seniority and qualifications."[3]

As a result of that agreement, the Respondent and the Union entered into a CBA, dated July 18, 2003, and effective from December 8, 2003, to December 7, 2009.[4] In August 2003, with the approval of the bankruptcy court, the Libra group formally purchased the Coalton facility, created the Respondent to operate it, and hired Pinnacle to manage it.[5]

B. The Initial Hiring Process

The Respondent initiated the hiring process in or about August or September 2003 by advertising job openings for the Coalton facility in a local newspaper. Job applications were then distributed by the Kentucky Bureau of Employment Services (KBES) and the Union. After a 2-or 3-week period, the KBES and the Union delivered stacks of applications. The Respondent then had the KBES administer a preemployment test to applicants. KBES then returned the ungraded applications to the Respondent.[6] Keffer took the applications and sorted them into two piles—one for former KESI employees and another for nonformer KESI employees. He then took the pile of applications from former KESI employees and sorted them into the types of jobs they previously performed. The piles of nonformer KESI employees were then sorted into the types of jobs that they applied for.[7]

Initial hiring was geared toward getting the rolling mill back into operation. The Respondent decided to delay the opening of the melt shop and instead purchase billets, a prefabricated steel, to supply the rolling mill.[8]

Accordingly, Keffer and Bruce Holcomb, another Pinnacle employee, initially interviewed 12 applicants with prior maintenance experience to prepare the rolling mill machinery. Six former KESI employees were hired in December 2003 to perform this function.[9]

C. Complaints of Selective Hiring

By January, the Respondent had hired 42 hourly employees to operate the rolling mill. The Union complained, however, that the Respondent was "cherry-picking" or engaging in selective hiring. The Respondent was well aware of this concern on the part of the Union.[10] Keffer informed the Union that the Respondent wanted to staff the Coalton facility with employees who were qualified and had a good attitude.[11] In January 2004, the Union filed an unfair labor act charge with the Board.

The Union went to the press and, on February 1, the Ashland, Kentucky Daily Independent published an article entitled, "Union files charge against Kentucky Electric Steel." The article quoted critical remarks by several union officials and former employees, including the following statement by Chaffin:

> "We were told we'd be called back in a certain order. But there have been inconsistencies," said Harry Chaffin, former president at Local 7054. "All we're wanting is a fair shake."[12]

The article appeared on the internet and, during that same week, a reporter from the Hamilton Spectator, a Canadian newspaper, contacted present and former union officials, including Chaffin. The Canadian press was interested in the Coalton facility because of Pinnacle's proposal to purchase the Hamilton Specialty Bar steel mill (the Hamilton steel mill) from Slater Steel, a bankrupt company seeking to liquidate its Hamilton, Ontario operations. During the late winter of 2003, Pinnacle and Keffer performed a "due diligence" investigation of Slater Steel. The investor who hired them also employed Keffer to negotiate a CBA with the United Steel Workers of Canada (the Canadian union) on behalf of the Hamilton steel mill's employees. This CBA was similar to the one Keffer negotiated for the Respondent.[13]

Chaffin, who served as both president of the Amalgamated Union and the unit that represented KESI's employees from

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[2] There was no specific information about the dates of negotiations, but Keffer testified that they lasted about 2 months before a CBA was executed. (Tr. 232, 237.)

[3] Union President Danny Click and union financial secretary, Almon Dickson, confirmed Keffer's testimony that the CBA did not contain a seniority hiring provision. (Tr. 182, 210, 241.) Click and Dickson also credibly testified, however, that the parties had a "gentleman's agreement" that the Respondent would hire based on the seniority and qualifications of former KESI employees. (Tr. 166–167, 210–212.) Keffer did not refute that assertion and, in fact, conceded that he and Hall agreed that seniority involved "[q]ualifications to do the job. And then if those two factors are relatively equal we will use length of previous service as a tie-breaker." (Tr. 240.)

[4] GC Exh. 8.

[5] In it is undisputed that Pinnacle is the Respondent's agent within the context of this controversy. (Tr. 8–10, 232, 293–294; R. Br. at 2.)

[6] Keffer noted that the Respondent scored the tests, but "didn't even look at them." (Tr. 273.)

[7] All findings as to how the Respondent prepared for the hiring process are based on Keffer's unrefuted testimony. (Tr. 241–246.)

[8] The melt shop's function was to melt scrap metal into billets. The billets are then reheated in the rolling mill and rolled into varying lengths and widths.

[9] R. Exh. 3.

[10] Scheel acknowledged that the Respondent was aware of the Union's "cherry-picking" allegations, but did not attempt to refute the allegation. (Tr. 64, 73.)

[11] Keffer's testimony as to what he told the Union during that period of time was also not refuted. (Tr. 248, 257.)

[12] During the spring of 2003, Chaffin was defeated in his bid for reelection as union president and Click was elected. (Tr. 125, 131; GC Exh. 6.)

[13] There is no dispute regarding Pinnacle's involvement with the Hamilton steel mill or the fact that the press initiated the contact with Chaffin. (Tr. 33–35, 93, 198, 253–255, 306.)

1999 until May 2003, was not a member of the negotiating committee.[14] Furthermore, he had no experience in rolling mill operations and had no expectation of being considered for one of those positions.[15] Nevertheless, he told the reporter, however, that he had been at a meeting when union leaders told members that the Respondent had agreed to hire by qualifications and seniority, but was engaging in selective hiring. Subsequently, on February 6, an article appeared in the Hamilton Spectator. It was entitled, "Slater suitor slammed by U.S. workers—Steelworkers say company unfair." The article initially quoted a charge by Hall that Pinnacle told a bankruptcy judge in Kentucky that it would recall 120 former KESI workers on a seniority basis, but after the plant reopened, Pinnacle was "ignoring senior workers in favour of younger employees and lower wages. To date, 40 workers have been rehired." The article then quoted Chaffin as follows:

> "That's the pattern Pinnacle followed in Kentucky," said Harry Chaffin, former president of the USWA local which represented Kentucky Electric workers. He helped to negotiate a new contract, "but as soon as they were out of bankruptcy they've gone to selective hiring," he said. "The Union people aren't very happy with Pinnacle right now," he said. "This company just hasn't been very good to the union people."[16]

The following day, February 7, the Canadian National Post Online followed up on the Slater Steel story with an article published in its Financial Post section entitled, "Steelworkers urge caution about reputation of potential buyer of Slater assets." The article referenced the Hamilton Spectator's February 6 article as follows:

> The Spectator quoted Harry Chaffin, former president of the Steelworkers local in Kentucky that negotiated a first contract between Kentucky Electric Steel workers and Pinnacle, as saying his members were "sold out." He said the company has engaged in selective hiring that ignored many laid-off senior employees in favour of younger staff who needed training.
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> "My advice to the workers in Hamilton would be to make sure everything they want from this company is locked down in contract (language) because the good faith part of our contract is not being honoured," Chaffin told the Spectator.
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> Only 40 workers have been rehired at Kentucky Electric, though the union was told as many as 120 workers would be brought back when the plant reopened last month, said Carl Hall, a Steelworkers' staff representative in Ashland, Kentucky.[17]

D. The Respondent's Response Toward the Union

The union complaints apparently succeeded as the Respondent proceeded to hire nearly all of its employees from the former KESI work force.[18] The Respondent agreed to "post" available positions for union members and, if none were qualified, only then would it consider applicants other than former KESI employees.[19]

In late April, the Respondent decided to reopen the melt shop after it was unable to acquire enough prefabricated billets to support the rolling mill's production. After the melt shop opened on June 4, the Respondent had openings for maintenance technicians. The Respondent proceeded to hire former KESI maintenance specialists until it exhausted the list. Then, at the Union's request, the Respondent hired former KESI welders, trained them, and converted them to maintenance technicians.[20] Chaffin, a welder at KESI during his last year there, was not among them. The former KESI welders hired as maintenance technicians by the Respondent included Philip Arrowood, Jeffrey Buckler, and Clyde Scott. The Respondent hired Arrowood on July 5; he was initially hired at KESI on July 10, 1967. The Respondent hired Buckler on November 1; he was initially hired at KESI on October 15, 1974. The Respondent hired Clyde Scott on January 10, 2005; he was initially hired at KESI on June 8, 1983.[21]

As of June, when the melt shop opened, all but 5 of the Respondent's approximately 100 hourly employees hired were former KESI employees. In addition to the negotiating committee members, the Respondent also hired former union officers, including former president, Jerry Brewer, and several grievance committeemen. The most notable, former KESI employee not hired, however, was Chaffin.[22]

E. The Respondent's Response Toward Chaffin

Chaffin, initially hired at KESI on August 31, 1973, is the most senior former KESI employee not hired by the Respon-

[14] (Tr. 87–88, 112, 159.)

[15] There were numerous individuals with earlier and later service dates than Chaffin at KESI who were offered jobs in the rolling mill. Chaffin conceded, however, that he had no experience in the rolling mill and does not claim that he should have been offered one there. (Tr. 136–137.)

[16] I sustained the Respondent's objection to Chaffin's proffered testimony that he was misquoted. He conceded that he complained to the reporter that the Respondent was cherry-picking, but it is irrelevant whether he was misquoted about anything else. The relevant issue in this case is the Respondent's reaction to the cherry-picking statement in the article. (Tr. 95- 97; GC Exh. 5; Jt. Exh. 1.)

[17] GC Exh. 4.

[18] Click and Scheel actually complimented each other with respect to the resolution of the seniority hiring issue. (Tr. 165–166, 182, 184, 314.)

[19] Keffer's testimony established that the Respondent did begin hiring on the basis of seniority and qualifications: "We posted the job and no one was qualified, then we went and hired [emphasis added]." (Tr. 249.)

[20] At KESI, the maintenance department included separate classifications for welders and maintenance specialists. The Respondent combined the two classifications. (Tr. 161, 164, 218, 257, 312–313.) Its formal job description stated that a maintenance technician must be able to perform "all functions mechanical or electrical) necessary to maintain all operating a service equipment using standard and specialized tools and equipment." R. Exh. 1.

[21] R. Exh. 3; GC Exh. 10; Tr. 162, 200–201, 328, 347.

[22] The transcript refers to a Jerry Burr, while the employee listings of the Respondent and KESI refer to Jerry Brewer. (Tr. 248–252; GC Exh. 10; R. Exh. 3.) I adopted the latter reference.

dent.[23] He submitted an employment application on or about September 1, 2003.[24] Chaffin spent the majority of his last 10 years with KESI as a storeroom attendant, but worked as a welder in the last year before KESI shut down. His previous experience also included 19–20 years as a mobile equipment operator. Chaffin also completed a year in KESI's maintenance training program.[25] Accordingly, Chaffin's prior experience qualified him for a maintenance technician position after the melt shop opened. With respect to seniority among those applicants qualified to be maintenance technicians, he had less seniority than Arrowood, but had greater seniority than Buckler and Scott.[26]

The Respondent's reason for neither hiring nor considering Chaffin for hire is not in dispute. Scheel, the Respondent's chief operating officer, read the National Post Online article and was clearly disturbed by Chaffin's comments. Scheel felt that Chaffin's remarks accusing Pinnacle of being untrustworthy reflected a bad attitude that made it difficult for him to hire Chaffin.[27]

Subsequently, on several occasions between June and October, Click asked Scheel to hire Chaffin as a maintenance technician based on his previous experience as a welder. Scheel repeatedly refused, eventually saying that as a result of the Canadian newspaper article, he thought that Chaffin had a bad attitude and was not a team player.[28]

Scheel's sentiments were communicated to Chaffin by a union official and, as a result, Chaffin retained Garis Pruitt, an attorney.[29] Pruitt wrote a letter to Click, dated June 9, requesting the Union's assistance in getting Chaffin a job with the Respondent. Click never showed the letter to Scheel.[30] On October 13, at Dickson's request, Scheel met with Chaffin in the Respondent's conference room. Others present at the meeting included Dickson, Woodrow Canterbury, a unit committeeman, and Click. The meeting lasted about 15–20 minutes. Chaffin told Scheel that he would like to have his job back and asked Scheel if there was a problem. Scheel responded that based on what he had read in the newspaper articles, he felt that Chaffin had a bad attitude and would not be a good team player. In Scheel's view, Chaffin's statements to the press "would make it very difficult to employ him." Chaffin responded that he had been misquoted and had not seen the article. At some point, Scheel asked Chaffin whether he had taken steps to retract his published statements. Chaffin testified that he had not attempted to correct the article. Click asked Scheel if he would consider hiring Chaffin if the latter retracted the published statement. Scheel stated he would investigate and determine whether Chaffin had been misquoted, but that Chaffin would have to be patient because he would not be able to immediately look into the matter due to pressing business.[31]

On November 3, 2004, Chaffin filed the initial unfair labor practice charge in the instant proceeding.[32] As a result of that action, Scheel did not, as he promised Chaffin, investigate whether Chaffin had been misquoted. In a written statement to a Board investigator, he explained the reason for his refusal to hire Chaffin:

> Would you hire someone who left a meeting agreeing to have you look into something, then went and filed a charge against you?[33]

III. DISCUSSIONS

A. The 8(a)(3) and (1) Violation

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) by failing to hire or consider hiring Chaffin because of his protected concerted activity. The Respondent denies that antiunion animus contributed to its actions and contends that Chaffin's comments did not constitute protected concerted activity and, in any event, he did not possess the necessary qualifications for any job.

To establish that the Respondent discriminatorily refused to consider Chaffin for hire, the General Counsel must establish that the Respondent excluded Chaffin from the hiring process and that the Respondent's animus toward union or other protected concerted activity contributed to its decision not to consider Chaffin's application for employment. The unlawful refusal to hire Chaffin essentially requires additional proof that he was qualified for an available position or that the Respondent's requirements for the positions were pretextual. If these elements are met, the burden shifts to the Respondent to show it would not have hired Chaffin or considered him for hire in any event. If the Respondent fails to show that it would have made the same hiring decisions even in the absence of Chaffin's union or other protected activity, then a violation of Section 8(a)(3) has been established. *FES,* 331 NLRB 9, 12–15 (2000), applying the Board's unlawful discharge analysis in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to refusal-to-hire proceedings.

[23] This finding is based on the KESI plant seniority list and the unrefuted testimony of Click and Dickson. (Tr. 184–185, 219–220; GC Exh. 10.)

[24] Tr. 90; GC Exhs. 3 and (a).

[25] Tr. 98–102, 158–59, 192, 228, 247.

[26] Tr. 162–165, 200–201, 280–281; GC Exh. 10.

[27] Scheel conceded that he read the article and, as a result, questioned Chaffin's attitude and ability to be a team player. (Tr. 35–37, 42, 49.)

[28] Click credibly testified that, on four or five unspecified dates after the melt shop opened and prior to October 21, he spoke to Scheel about hiring Chaffin. (Tr. 160–162, 168–170.)

[29] I considered such hearsay testimony only as background information leading to Pruitt's letter. (Tr. 107–108.)

[30] Click's conceded that he did not deliver the letter to the Respondent, but his reason was not made known. (Tr. 179.)

[31] The testimony of Scheel, Click, and the union attendees at the meeting was remarkably consistent as to what Scheel said at the meeting. (Tr. 40–44, 66, 109–115, 134–135, 169–173, 182–183, 196–199, 204–205, 208, 220, 316--317.)

[32] GC Exh. 1(a).

[33] Scheel attempted to backtrack at trial by suggesting that it was not urgent that he investigate the matter or that the charges were filed too soon after the meeting. I do not find these inconsistent explanations credible. (Tr. 47, 71–72, 317.)

1. Chaffin's exclusion from the hiring process

Chaffin applied for a variety of jobs on September 1, 2003. It is undisputed that the Respondent has refused to hire Chaffin or consider him for hire because of his published statements in the Hamilton Spectator's February 6 and National Post Online's February 7 articles. On several occasions in 2004, Scheel told Click that Chaffin's statements accusing Pinnacle of being untrustworthy reflected a bad attitude that made it difficult to employ him. Scheel restated his position at the October 21 meeting and confirmed it in his trial testimony. To date, Chaffin has not been hired or interviewed.

2. Chaffin's concerted protected activity

Section 7 of the Act provides, in pertinent part, that employees shall have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." In the case of individual action, an action is deemed concerted "where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth[s] of the concerns expressed by the group." *Mike Yurosek & Son,* 306 NLRB 1037, 1038 (1992), supplemented by 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).

The Respondent does not dispute knowledge of Chaffin's activities. Scheel admitted that, at the very least, he read the February 7 National Post Online article entitled, "Steelworkers urge caution about reputation of potential buyer of Slater assets." The article referenced the Hamilton Spectator's February 6 article and contained Chaffin's remarks questioning the good faith of the Respondent and its agent, Pinnacle, subsequent to collective bargaining for the Coalton facility. Chaffin also advised the Canadian union to "lock down" Pinnacle as to all collective bargaining issues. Scheel reaffirmed his knowledge about the article at the October 13 meeting with Chaffin, Pruitt, and union officials. In that meeting, Scheel stated that Chaffin was not qualified for a job because his statements to the press indicated that he had a bad attitude and was not a team player.

The Respondent contends, however, that Chaffin did not engage in protected concerted activity because his statements to the press did not relate to the enforcement of a CBA or other union rights. In Respondent's view, Chaffin's action amounted to an individual complaint that he had not been hired based on seniority. Furthermore, the Respondent contends that Chaffin's subsequent actions in retaining an attorney to complain to the Union, Click's several conversations with Scheel about hiring Chaffin, and the October 21 meeting to discuss Chaffin's complaint, all confirm that his statements were made only for the purpose of getting him hired.

The Respondent's focus on Chaffin's interest in employment is misplaced. Chaffin's expression of concern to the press regarding the hiring and seniority issue was a logical outgrowth of the Union's filing of an unfair labor charge in January. The Canadian press, covering the Respondent's proposal to purchase the Hamilton steel mill and its negotiations with the Canadian union, contacted Chaffin and other members of the Union for comment. At the time Chaffin made such remarks, only 42 of the approximately 120 former KESI employees had been hired. Chaffin's remarks, although critical of the Respondent and its agent, Pinnacle, merely reflected the Union's formal charge that senior workers were being passed over in favor of younger workers. His published statements also warned the Canadian union to be cautious in labor negotiations with Pinnacle. Chaffin explained that the Respondent was not honoring the "good-faith part of our contract" and advised the Canadian union to "make sure everything they want from this company is locked down in contract (language)." He asserted that union members had been "sold out" and that the Respondent "has engaged in selective hiring that ignored many laid-off senior employees in favour of younger staff who needed training." Indeed, at the time he made such statements (February), Respondent did not have any jobs available for which Chaffin qualified. Chaffin's remarks to the press were clearly intended to elicit public support for the Union's charge and, therefore, constituted protected concerted activity. *Dougherty Lumber Co.,* 299 NLRB 295 (1990), enfd. 941 F.2d 1209 (6th Cir. 1991); *Alaska Pulp Corp.,* 296 NLRB 1260 (1989), enfd. 944 F.2d 909 (9th Cir. 1991).

Chaffin's remarks regarding the Respondent's labor practices and his advice to the Canadian union—not to trust Pinnacle and to "lock down" in writing all important issues—also constituted an activity in which he reasonably believed he was coming to the mutual aid or protection of other employees. The Supreme Court has liberally construed the "mutual aid or protection" clause of Section 7 to include concerted activities by employees "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). "[I]f they might reasonably be expected to affect terms or conditions of employment," concerted activities are protected by Chapter 7. *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981) (per curiam). Seniority is a "valuable" condition of employment. As such, concerted activities directed at protecting seniority rights are protected by the Act. *Metal Blast, Inc. v. NLRB,* 324 F.2d 602, 603 (6th Cir. 1963) (per curiam). The fact that Chaffin's expression of concern over the seniority rights of former KESI employees was coupled with advice to another labor organization is of no consequence, since the Act protects against interference with any union or other protected concerted activity. *Washington State Service Employees (Severn),* 188 NLRB 957, 959 (1971).

Finally, although not addressed by the Respondent, the statements were not so abusive or maliciously untrue as to lose their protection under the Act. See *Brownsville Garment Co.,* 298 NLRB 507 (1990) (statements by union members that the use of company resources was a causal factor in the closure of the employer's predecessor found to be within the scope of protected Section 7 activities); *NLRB v. Electric Workers Local 1229,* 346 U.S. 464 (1953) (employees may communicate with third parties in circumstances where the communication is related to an ongoing labor dispute and is not disloyal, reckless, or maliciously untrue as to lose the Act's protection). Although a seniority hiring provision was not written into the CBA, the credible testimony demonstrated that the Respondent and the Union had a verbal "gentleman's agreement" regarding a hiring process that would include seniority as a factor. That agreement was implemented by the Respondent's hiring on the basis of

seniority and qualifications after the union grievance was resolved. Accordingly, Chaffin's statements to the press could hardly be considered inaccurate, much less malicious. See *Auto Workers Local 980,* 280 NLRB 1378 (1986); *Alaska Pulp Corp.,* 296 NLRB 1260 (1989).

3. The Respondent's antiunion animus

The Respondent contends that the General Counsel failed to show antiunion animus for several reasons: (1) the Respondent voluntarily recognized the Union as its employees' representative; (2) the Respondent offered a position to every member of the negotiating committee, even though it was not required to do so; (3) Scheel and Keffer had extensive experience dealing with unions and were well aware of employees' rights under the Act; (4) numerous employees hired had been officers in the Union; (5) Scheel had been extremely helpful in resolving numerous hiring issues relating to employees other than Chaffin; (6) the Respondent placed several positions that were salaried under KESI into the bargaining unit; (7) the unfair labor practice charge filed by the Union in January was deferred by the Regional Director and resolved with the Union; and (8) the Respondent and the Union agreed on job assignment classifications after the CBA was executed.

It is undisputed that the Respondent and the Union generally resolved their issues. The Respondent voluntarily recognized the Union shortly after it sought to purchase the Coalton facility at a bankruptcy auction, offered a position to every member of the negotiating committee, as well as numerous officers and former officers of the Union, and entered into a CBA. The Respondent and the Union subsequently resolved the unfair labor practice charge and agreed on the general hiring methodology and job classifications. The Respondent's analysis, however, ignores its animus toward Chaffin's protected concerted activity.

"An employer's failure to discriminate against every union supporter does not disprove a conclusion that it discriminated against one of them." *Handicabs, Inc.,* 318 NLRB 890, 897–898 (1995). In this case, the Respondent resolved all of its major issues with the Union regarding hiring at the Coalton facility. Indeed, Click testified that he was pleased with the Respondent's hiring of all but five of its workers from the former KESI workforce. Nevertheless, Chaffin engaged in a form of protected concerted conduct that the Respondent would not tolerate. He complained to the press about the Respondent's labor practices and advised similarly situated Canadian steel workers to be cautious in their labor negotiations with Pinnacle, the Respondent's agent. Scheel admitted that the statement excluded Chaffin from hiring consideration because it revealed that Chaffin had a bad attitude and would not be a team player. Accordingly, Scheel's statements demonstrated that the Respondent's animus toward Chaffin's protected concerted conduct was the motivating factor in its refusal to hire Chaffin or consider him for hire.

4. Chaffin's qualifications for an available position

The Respondent contends that Chaffin's prior experience as a welder, storeroom attendant, mobile equipment operator, and janitor did not qualify him for any available positions. The primary explanation for this position is that none of those previous positions specifically match any of the job classifications created by the Respondent. The Respondent also highlights the fact that Chaffin spent most of the last 10 years as a store room attendant.[34] It is undisputed, however, that, at the Union's request, the Respondent hired three former welders at KESI—Arrowood, Buckler, and Scott—and trained them to become maintenance specialists.[35] It is also undisputed that Chaffin, a certified welder who performed welding duties for KESI his last year there, had greater seniority than Buckler and Scott.

The Respondent correctly states that there was no CBA provision for hiring on the basis of seniority. The undisputed facts demonstrate, however, that after the Union filed a grievance, the "gentleman's agreement" between the Union and the Respondent regarding was enforced and seniority played a role in the hiring process for everyone, except Chaffin.[36] The Respondent considered applicants on the basis of seniority and qualifications. In other words, if the next person on the KESI seniority list was qualified for an available position, he or she was hired. The record is devoid of any credible evidence that, after the melt shop opened, the Respondent considered more than one applicant for any available position and hired the most qualified person.

After the melt shop opened in June, the Respondent began hiring maintenance technicians. After exhausting the list of former KESI maintenance specialists, the Respondent, at the Union's request, hired former KESI welders as maintenance technicians and provided them with on-the-job training. Chaffin was a certified welder with 1 year of experience on the position. As the record shows that Arrowood, Buckler, and Scott were hired and then trained as maintenance technicians solely because they had worked as welders, there can be no doubt that Chaffin was also qualified to be hired for such a position. Indeed, Scheel's testimony revealed that the Respondent's only basis for finding Chaffin unqualified was his bad attitude. Scheel arrived at that conclusion because he was disturbed by the statements made by Chaffin to the press.

B. The 8(a)(4) and (1) Violation

The General Counsel also alleges that the Respondent violated Section 8(a)(4) and (1) when it admittedly failed to hire Chaffin or consider him for hire after he filed the instant unfair labor practice charge. The Respondent does not deny the charge, but attempts to justify Scheel's adverse reaction to Chaffin's filing of the charge by explaining that "the urgency of

[34] R. Br. at 15–22.

[35] The Respondent's formal job description stated that a maintenance technician must be able to perform "all functions (mechanical or electrical) necessary to maintain all operating service equipment using standard and specialized tools and equipment." (R. Exh. 1.)

[36] The Respondent's request for an adverse inference that Carl Hall, the Union's principal negotiator, would have provided unfavorable testimony on the significance of Chaffin's hiring date, is denied. There is no evidentiary basis in the record for an inference that Hall would have provided testimony contrary to what was in the KESI "hire date" record. (GC Exh. 10.)

checking into the accuracy of the quotes became less since Mr. Chaffin apparently elected to proceed in another direction."[37]

Section 8(a)(4) makes it unlawful "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act." Unless an employer can establish that its action is motivated by a legitimate business purpose and is not pretextual or retaliatory, its action will be found unlawful. *Hudson Valley Hotels,* 283 NLRB 1146 (1987). Scheel, not even attempting to provide a pretextual justification for his action, conceded to a Board investigator that he did not consider Chaffin for hire, as he promised at the October 21 meeting, because Chaffin filed an unfair labor practice charge. He confirmed this view at the hearing by expressing the view that Chaffin's filing of the charge vindicated his initial belief that Chaffin was not a team player. Accordingly, the General Counsel has made the requisite prima facie showing under *Wright Line*.

C. The Respondent's Burden

The General Counsel, having made a prima facie case for violations of Section 8(a)(1), (3), and (4), the burden shifted to the Respondent to demonstrate that it would not have taken the same action even in the absence of Chaffin's protected concerted conduct. *FES,* 331 NLRB at 12, 15. It is incontrovertible that the Respondent, after the Union's charge was resolved, began considering former KESI employees for hire on the basis of seniority. If such an applicant was qualified, he or she was hired. If not, then the Respondent went outside the bargaining unit to hire. Chaffin, although senior to Buckler and Scott, was passed over for consideration when the Respondent, at the Union's request, began hiring welders for on-the-job training as maintenance specialists. Furthermore, the Respondent offered no evidence that Chaffin would not have been found qualified for the position. Accordingly, the Respondent did not meet its burden of proof. Under the circumstances, I conclude that the Respondent violated Section 8(a)(1), (3), and (4) by failing to hire Chaffin or consider him for hire as a maintenance technician.

CONCLUSIONS OF LAW

1. The Respondent, Kentucky Electric Steel Acquisitions, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Steelworkers of America, Local 7054, USWA, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to consider and hire Harry Chaffin because he engaged in protected concerted conduct, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. By refusing to consider and hire Harry Chaffin for employment because he filed an unfair labor practice charge, the Respondent violated Section 8(a)(1) and (4) of the Act.

5. The aforementioned unlawful conduct engaged in by the Respondent constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[37] R. Br. at 10.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1), (3), and (4) of the Act by refusing to hire Harry Chaffin for employment, it must offer him instatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date he would have been hired, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, Kentucky Electric Steel Acquisitions, Coalton, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider applicants for employment, and failing and refusing to hire them, on the basis of their union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Harry K. Chaffin instatement to one of the positions for which he applied or, if those positions no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

(b) Make Harry K. Chaffin whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire and consider for hire Harry K. Chaffin and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary or useful in analyzing the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Coalton, Kentucky, copies of the attached notice

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to consider applicants for employment, or to hire applicants for employment, because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Harry K. Chaffin instatement to the position of maintenance specialist or one of the other positions for which he applied or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Harry K. Chaffin whole for any loss of earnings and other benefits suffered as a result of our unlawful discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Harry Chaffin, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to hire will not be used against him in any way.

KENTUCKY ELECTRIC STEEL ACQUISITIONS

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."